

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 27.10.2006

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

A.S.No.1044 of 1996

and

C.M.P.No.12897 of 2005
C.M.P.No.10028 and 10029 of 2006

1. Venkatesan
2. V.Kothandaraman
3. V.Logaiah
4. V.Kubendran

.. Appellants/Defendants 2,5 to 7.

vs.

1. K.Namadevan
2. Raghavan (died)
3. Kothandan (died)
4. Kamalammal
5. Tmt. Mala
6. Thiru Venugopal
7. Mr. Ramesh
8. Mr. Devaraj
9. Mrs. N. Padmavathi
10. N. Ananda Kumar
11. N. Vanitha (minor)
12. N. Nithya (minor)

.. Respondents/Plaintiff
Defendants 3,4, 8.

(R11 & R12 rep by 1st respondent)

(RR5 to 8 bring on record as LR
of deceased 3rd respondent vide order
dated 5.9.2000 in CMP.12520 & 2119/97
passed by ASVJ & KGPJ)

13. Purasi Benefit Fund Ltd.,

14. Balajee & Co.

(RR 9 to 14 impleaded as respondents
vide order of the Court dated.31.10.2000
in CMP.4554/2000 passed by
PSMJ & KGPJ)

15. Amirthavalli Thayarammal

16. R.Paranthaman

17. R.Sanjeevi

18. R.Rajesh

[RR.15 to 18 brought on record as LR's.

Of the deceased 2nd Respondent [Raghavan]
vide order of Court dated 15.07.200-4 made
in CMP.12374/04].

Prayer: This Appeal has been filed under Section 96 of CPC against the decree and Judgment dated 31.7.1996, passed in O.S.No.1113/1996, on the file of the IIInd Additional Judge, City Civil Court, Madras.

For Appellants : Mr.T.V.Ramanujam, Senior Counsel
for Mr.T.V.Krishnamachari

For Respondents : Mr. AR.L.Sundarasan, Senior Counsel,
for Mrs.AL.Gandhimathi
(for R1, R5 to R9, R15 to R18)

Mr.S.Ravikumar (For R13)

JUDGMENT

This appeal has been preferred against the decree and Judgment passed in O.S.No.1113/1996 on the file of the II Additional Judge, City Civil Court, Chennai. The suit is for partition and also for mesne profits. The Defendants are the appellants herein.

2. The short facts sans irrelevant particulars are as follows:

2(a) The plaintiff and Defendants 2 to 4 are the sons of the first Defendant. They constituted a Hindu undivided joint family. The plaint schedule property is the ancestral property devolved on the joint family of the plaintiff and the Defendants. The plaint schedule property was purchased by the first Defendants father and his brother Munusamy Mesthri out of the joint family income. The plaintiff's grand mother Poodurammal was looking after the plaint schedule property on behalf of the plaintiff and the Defendants. After the death of Poodurammal the first Defendant and his brother Munusamy Mesthri were in possession and enjoyment of the plaint schedule property.

2(b) on the allegation that the above said Munusamy Mesthri and his LRs have executed a release dated dated 28.8.1965 in favour of the second Defendant while the plaintiff was a minor is not true. The first Defendant was aged 92 years and he was suffering from Paralytic attack and taking advantage of the ill health of the first Defendant-Desavalu, the second Defendant had cunningly obtained the above said release deed. The second Defendant was working as an assistant in the Criminal Court at Gorge Town, Chennai and there was a criminal action taken and pending against the second respondent in connection with misappropriation of funds. The factum of release deed in favour of the second Defendant was known to the plaintiff only through the reply notice dated 2.1.1989 sent by the second Defendant. The second Defendant had obtained the above said release deed clandestinely. The first Defendant has no exclusive right or title in respect of the Hindu joint family property in favour of the second Defendant. Hence the above said release deed alleged to have been executed by the first Defendant in favour of the second Defendant is not valid and binding on the plaintiff.

2(c) There are three tenants in the suit property. The second Defendant is getting a monthly rent of RS.1,700/- towards the rent from those tenants. The second Defendant never gave any share in the said rent to the plaintiff. The plaintiff is entitled to 7/30 share in the suit property and towards his 7/30 share in the above said monthly rent of Rs.1,700/- for the period of three years. The plaintiff is entitled to Rs.14,280/-. The receiver is to be appointed to safeguard the interest of the plaintiff's portion of 7/30 share in the plaint schedule property and also for Rs.14,280/- being the damages for three years. Pending suit the first Defendant mentioned in the plaint, but would deny that the suit property belongs to Hindu joint family property. The plaint schedule property belongs to the first defendant's mother Poodurammal, exclusively. The plaint schedule property was purchased by Poodurammal along with the first Defendant and his brother Munusamy Mesthri on 20.3.1921. After the death of Poodurammal her two sons were in exclusive possession and enjoyment of the plaint schedule property. While so, the first defendant's brother Munusamy Mesthri had executed a release deed in respect of his share in the plaint schedule property in favour of the first Defendant. Latter on 22.4.1978, the first Defendant had executed a conveyance through which D2 become entitled to the plaint schedule property exclusively. The second Defendant has made lot of improvements in the suit property from out of the income derived by way of rent from the suit property. The plaint schedule property is not the joint family property as alleged by the plaint. The suit property was mortgaged for Rs.15,000/- by the first Defendant and also by his brother Munusamy Mesthri in favour of one T.V.Ramarao Guptha. The said mortgage of Rs.15,000/- was discharged by obtaining a loan from an enterprise by name Amirthavalli Thayarammal Enterprises. The plaint schedule property was brought to auction sale on 26.09.1963 through Murari & Co., that auction was stopped only by paying Rs.3,500/-. As on 15.4.1977 the debt is to the tune of Rs.36,105/- in respect of the suit property. The plaintiff has written a letter stating that he was prepared to relinquish his share in

the property provided he was paid Rs.2,000/-. The other respondents have also executed a similar letter but no one has come forward to discharge the previous mortgage loan. The second Defendant, Kothandaraman, plaintiff and Sunthari were paid Rs.2,000/- and Ragavan(D3) was paid Rs.2,500/- and Varalakshmi was paid Rs.1,500/- in respect of the share in the plaint schedule property to get release deed in respect of their share. The plaintiff has no right or title in respect of the suit property. There is no criminal proceedings initiated against the second Defendant. The second Defendant has not created any document in his favour taking advantage of the advanced age of the first Defendant. The second Defendant/appellant is the owner of the plaint schedule property. The suit is barred by limitation. The Court fee paid by the plaintiff is not correct. The suit is bad for non-joinder of necessary parties. Hence, the suit is liable to be dismissed with costs. The plaintiff in his reply statement has denied the averments in the written statement, thereby rejecting his claim set out in the plaint.

3. On the above pleadings the learned trial judge has framed seven issues and on the basis of the available documentary and oral evidence has passed a preliminary Decree for plaintiff's 7/30 share in the suit property and also for a sum of Rs.14,280/- being the damages towards plaintiff's share and also relegated the mean profits to a separate proceedings under Order 20 Rule 12 of CPC. Aggrieved by the findings of the learned trial Judge, the Defendants 2, 5 to 7 have preferred this Appeal.

4. Now the points for determination in this Appeal are:

a) Whether the suit property is the Hindu joint family property purchased out of the joint family income of the plaintiff's father, plaintiff and his brother Kesavalu or the plaint schedule property was purchased from out of the independent income of Poodurammal, the grant mother of the first Defendant and also the first Defendant and his brother Munusamy?

b) Whether the plaintiff is entitled to 7/30 share in the plaint schedule property or for a lesser share?

5.Points:- Point No.1.

5(i) The first and foremost point to be decided in this Appeal is whether the suit property is a joint family property of the first Defendant, plaintiff and D2 to D4 or whether the property was purchased through self-acquired income of Poodurammal, grand mother of the plaintiff and father of D1, and Munusamy, the brother of the father of D1? Ex.A.1 is the sale deed in respect of the plaint schedule property dated 23.11.1921.

5(ii) The learned trial Judge at page 7 of his Judgment has dealt with the validity of Ex.A.1-sale deed and has come to an erroneous conclusion that it was not purchased out of self acquired income of Poodurammal or Munusamy(brother of D1) or Kesavalue-D1. The trial Court for rejecting Ex.A.1-sale deed has assigned reasons stating in the Written Statement that there is no evidence to show that the above said

document was purchased only out of independent income of Poodurammal or Munusamy Mesthri or Kesavalu.

5(iii) Before coming to such a conclusion the learned trial Judge has completely forgotten an important point that the said document is an ancient document of the year 1921. Section 90 of the Evidence Act deals with ancient documents. Section 90 of the Evidence Act runs as follows:

"Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

Explanation:- Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable. This Explanation applies also to section 81."

A perusal of Ex.A.1- registered copy of the sale deed dated 23.11.1921, will go to show that the said document was executed in favour of Poodurammal @ Allameluammal and her minor sons Kesavalu(D1) and Munusamy (D1's brother) in respect of the suit property. There is a recital in Ex.A.1 itself that the said property was purchased out of Poodurammal's seedhana property and also the income saved out of her self acquired. So the above said recital will clearly go to show that Ex.A.1 was purchased in the name of Poodurammal, the mother of D1. The above said document was executed only by her husband Aiya Mesthri. It is further pertinent to note from the above said sale deed-Ex.A.1 that Pooduramal's husband Aiya Mesthri had purchased the said property on 21.8.1915 from out of his own income from one Thirumangai Ammal. So it cannot be said that the plaint schedule property was the property of Hindu joint family of the plaintiff, D1 and D2 to D4. Ex.A.1 is an ancient document of 30 years old for which no further proof is necessary as per Section 90 of the Evidence Act as stated supra. So, the learned trial Court's finding that Ex.A.1 is not a document in favour of Poodurammal cannot be sustained. So under Ex.A.1 Poodurammal was entitled to 1/3 share, D1 was entitled to 1/3 share and his brother Munusamy Mesthri was entitled to 1/3 share in the plaint schedule property.

5(iv) The second Defendant claims under Ex.B.7 right in respect of the entire plaint schedule property. Ex.B.7 is the settlement deed dated 22.4.1978. executed by Kesavalu, who is one of the vendee under Ex.A.1, who is entitled to 1/3 share in the plaint schedule property under Ex.A.1. It is admitted by both parties that Poodurammal is now no more. So Poodurammal's 1/3 share in respect of the plaint schedule property under Ex.A.1 will devolve on her two sons viz. Munusamy Mesthri and Kesavalu, the other vendees under Ex.A.1. So Munusamy Mesthri will be

entitled to one half ($1/3 + 1/3 \times 1/12 = 1/2$) and Kesavalu(D1) will be entitled to one half ($1/3 + 1/3 \times 1/12 = 1/2$) share in the plaint schedule property. Under Ex.B.7 Kesavalu(D1) had settled the entire plaint schedule property in favour of D2 subject to liability to pay and discharge the previous mortgage in respect of the suit property in favour of Thayarammal Charities, Madras. But Kesavalu himself has no right or title to execute Ex.B.7 in respect of the entire plaint schedule property because he himself had only one half right under Ex.A.1 after the death of Poodurammal.

5(v) On the other hand the plaintiff has produced Ex.A.2-release deed said to have been executed by Munusamy, the other vendee under Ex.A.1-sale deed. Ex.A.2 is in favour of eight persons. Ex.A.2 is dated 28.8.1965. Even in Ex.A.2 it has been clearly stated that the plaint schedule property was purchased by Poodurammal from out of her seedhana funds in her name and in the name of her sons Munusamy Mesthri and Kesavalu on 23.11.1921 and that after the death of Poodurammal her son Kesavalu and Munusamy Mesthri were in absolute possession and enjoyment of the plaint schedule property. Under Ex.A.2 Munusamy Mesthri has only released his one half share in the plaint schedule property in respect of eight persons, they are 1. Kesavalu Mesthri (D1), 2. Venkatesan (D2), 3. Logaiya (D6), 4. Gubenthiran (D7), 5. Kothandaraman (D5), 6. Ranganathan, 7. Kothandam (D4) and 8. Namathevan (plaintiff). So under Ex.A.2 plaintiff will be entitled to $1/16$ share only ($1/2 \times 1/8 = 1/16$). Ex.B.13 is a mortgage deed dated 26.5.1960 executed by Poodurammal @ Alameluammal, Kesavalu and Munusamy Mesthri in respect of the plaint schedule property for a sum of Rs.6,000/-. There was also subsequent mortgage dated 28.8.1965 under Ex.B.1 which was discharged by Ex.B.13 mortgage, is also seen from an endorsement on the reverse of page 2 to Ex.B.13 itself. So Ex.B.13-mortgage is still subsisting in respect of the plaint schedule property. The said mortgage liability will also bind $1/16$ th share of the plaintiff in the suit property.

5(vi) The learned senior counsel appearing for the appellant would contend, basing on an unmarked document for which C.M.P.No.1029/2006 was filed to send for the original of a release deed said to have been executed by the plaintiff to show that the entire right of the plaintiff has been released in favour of D2. But the said document was denied by the plaintiff while he was examined before the Court as P.W.1 on 3.11.1995 between 2.30 p.m. and 3.00 pm. But the said document dated 22.4.1977 was not even marked through D1. The said document is not a registered document. Under such circumstance, C.M.P.No.1029/2006 is also liable to be dismissed.

5(vii) The appellant has also produced the settlement deed executed by the first Defendant in favour of his wife N.Padmavathi and patta issued in favour of one K.Venkatesan (first appellant) dated 1.8.1986 and the proceedings of the Revenue Department in proceedings No.74107/78 dated 23.12.1978, to receive as additional evidence. Since Ex.A.1 has been held to be valid in this Appeal there is no necessity to receive the above said additional documents. Hence CMP.No.12897 of 2005 is also dismissed.

5(viii) CMP.No.10028 of 2006 is also to receive the postal covers in which Ex.B.8 has been sent. Since Ex.A.1 has been upheld in the Appeal the above said documents are also not necessary. Hence, CMP.No.10028 of 2006 is also dismissed.

5(ix) Hence I hold on the point No.1 that under Ex.A1 the plaint schedule property was purchased out of Poodurammal sreedhana properties in her name and her two sons Munusamy Mesthri and Kesavalu(D1) and I further hold that the plaint schedule property is not the Hindu joint family property of the plaintiff and Defendants 1 to 4. Point No.1 is answered accordingly.

5(x) Point No.2:- In view of my findings in the earlier paragraphs the plaintiff will be entitled to 1/16th share alone under Ex.A.2-release deed executed by Munusamy Mesthri. Point No.2 is answered accordingly.

6. In fine, the Appeal is partly allowed and a preliminary Decree of partition for plaintiff's 1/16th share in the plaint schedule property is passed subject to mortgage liability over the property. The suit is dismissed in respect of the relief of Rs.14,280/- towards arrears of rent. The question of arrears of rent for the period of three years is to be relegated to be decided in the final Decree proceedings. Considering the close relationship of the parties there is no order as to costs.

Sd/-

Asst. Registrar.

/true copy/

Sub Asst. Registrar.

ssv

To,
The Registrar,
City Civil Court, Madras.

The Record Keeper, VR Section, High Court, Madras.

+ 1 CC To Mr. AL.Gandhimathi, Advocate SR NO. 56722

+ 1 CC To Mr. TV.Krishnamachari, Advocate SR NO. 50404

A.S.No.1044 of 1996

gm[co]
Gp/19.12.